No. 415.

Brf. of Atty. Gen'l (Richards)
for Appellee (Def'dt)

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

JOHN ANDERSON, APPELLANT,
v.
MORGAN TREAT, UNITED STATES marshal for the eastern district of Virginia. } No. 415.

MOTION TO DISMISS APPEAL FROM THE ORDER OF THE DISTRICT JUDGE DENYING A WRIT OF HABEAS CORPUS AND DISMISSING THE PETITION THEREFOR.

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The appellant, John Anderson, was indicted and on December 23, 1897, convicted of the murder on August 6, 1897, on the high seas, of William Wallace Saunders, mate of the American vessel *Olive Pecker*. The jury, having the option of qualifying their verdict so as to make the punishment imprisonment for life, found no mitigating circumstances, and Anderson was sentenced to death. Anderson was defended on the trial by Mr. George McIntosh, a leading member of the Norfolk bar, who, at Anderson's request, had been assigned by the court, under section 1034, Revised Statutes, for that purpose. The case was carried to this court on error, and

the conviction affirmed, Mr. Chief Justice Fuller delivering the opinion on May 9, 1898 (170 U. S., 481).

The mandate being sent below, execution of the sentence was fixed for August 26, 1898. On that day Hugh G. Miller and P. J. Morris, assuming to act as counsel for Anderson, filed with Judge Waddill, of the district court of the United States for the eastern district of Virginia, a petition for a writ of habeas corpus (Record, pp. 1–3), the alleged ground being that Anderson was deprived "of the free exercise of his rights to be represented by counsel, in accordance with article 6 of the amendment of the Constitution of the United States."

The facts stated in support of this claim are these:

On November 7, 1897, Anderson was delivered to the United States marshal and confined in the city jail of Norfolk to await his examination before the United States commissioner. On that day, while thus confined, he employed as counsel one P. J. Morris, an attorney of Norfolk. (How Anderson, who was without money and had to have counsel assigned him, "could employ" Morris on the very day he was turned over by the officers of the *Lancaster* to the United States marshal and confined in jail does not appear.) On the same day *Morris* called at the jail *and asked permission* to consult with Anderson. Admission was refused him for the reason that the United States district attorney had instructed the jailer to allow no one to see Anderson. On the same day Morris asked permission, by telephone, of the United States attorney to visit the jail and consult with Anderson. This was refused.

On the night of the same day the United States attorney informed Morris that he would let him know on the following day whether permission would be granted him to consult with Anderson. Before Morris was given this permission, and without notice to Morris of the time of the preliminary hearing, Anderson was taken to the office of the United States commissioner and examined, without the aid or presence of Morris. (It appears subsequently that this examination was purely voluntary on the part of the prisoners.)

Before the examination was completed, Morris discovered it was going on, without his presence and before any consultation could be had with Anderson, and thereupon he (*Morris*) applied to the United States attorney and to Judge Hughes, then United States district judge, and was told by them that, as the defense of Anderson was inconsistent with the defense of others charged at the same time with complicity in the destruction of the vessel *Olive Pecker*, any attorney representing both prisoners was objectionable, and that the court would not permit the same attorney to represent both Anderson and the other prisoners, and therefore the court would assign Anderson an attorney to represent him.

These are the only facts alleged in support of the claim that Anderson was deprived of the guaranty, under article 6 of the amendments to the Constitution, "to have the assistance of counsel for his defense."

It is to be observed, *there is no averment that Anderson at any time applied to the judge and requested that Morris be permitted to see him, or be assigned or recognized as his*

counsel. The allegation is that *Morris*, who was expecting employment, not to say seeking employment, by the prisoners, applied to the United States attorney and judge to see Anderson and to be recognized as his counsel.

The court will observe further, that these transactions took place on the 7th and 8th of November, 1897, immediately after Anderson was turned over by the officers of the U. S. S. *Lancaster* to the United States marshal at Norfolk, and before his indictment and trial.

Boiled down, the claim is, that Anderson was deprived of a constitutional right, and his subsequent trial rendered null and void, because *certain requests of Morris were refused;* the United States attorney refused Morris permission to see Anderson, and the court, for good reasons, refused Morris an assignment as counsel for Anderson.

Both Morris and Anderson, if in fact the matter was brought at that time to Anderson's attention, acquiesced in the propriety and reasonableness of Judge Hughes's action, for, on November 8, 1897, as shown by the record (pp. 3 and 4), the court, upon its own motion, "as well as upon the request of the accused, John Anderson," assigned George McIntosh, esq., as counsel for the said John Anderson.

It further appears (Record, p. 4) that on November 9, 1897, Morris made a written statement in which he said that Mr. White, the United States attorney, had treated him with the utmost consideration; that on November 8, when he went to the office of Mr. White, he found he was about to examine the prisoners, and told Mr. White that he (Morris) *expected to be employed by them*. Mr.

White then informed him that he had not himself talked with the men, and that it was imperatively necessary he should do so in order to judge which would be indicted and which would be needed only as witnesses, and as soon as he had completed that *and the men had employed him* (Morris), they would be at his (Morris's) disposal; that he (Morris) acquiesced in the propriety of this position; that the men were in the custody of the United States marshal and in the United States marshal's room after this preliminary examination, which he (Morris) understood was voluntary on the part of the prisoners, and before it was finished he (Morris) applied to Judge Hughes to give him permission to see the men who were then in the United States marshal's custody and in his office. This was done, and five of the men then in writing employed him (Morris), and he then gave this writing to Mr. White.

On page 5 is a copy of the written authority given November 8 by the members of the crew to Morris to represent them as counsel, with the permit issued by Judge Hughes to Morris to consult with his clients.

Upon these facts the district judge properly refused the writ. The application was wholly without merit, and was made at the last moment for delay only. This appeal was then taken, obviously for the same purpose and with no expectation of a reversal.

Anderson was not denied the assistance of counsel in his defense. On the contrary, learned counsel, at his own request, was assigned for his defense, and this defense, within the knowledge of this court, was conducted with marked zeal and ability.

It does not appear from the record that Anderson ever protested against the assignment of Mr. McIntosh to defend him or requested the assignment of Mr. Morris to defend him, but, on the contrary, it affirmatively appears that on November 8 he requested the court to assign Mr. McIntosh to defend him, and the court accordingly made such assignment.

It is unnecessary for me to emphasize the propriety of Judge Hughes's action in insisting that Anderson, upon an issue of life or death, should have his own counsel, of standing and ability, unembarrassed by employment by any others concerned in the transactions on the *Olive Pecker*.

Anderson was not denied the assistance of counsel; but if he had been, the denial would have been an error to be corrected by proceedings in error. It could not serve to secure his discharge upon a writ of habeas corpus. (*Ex parte Yarbrough*, 110 U. S., 653; *Ex parte Bigelow*, 113 U. S., 328, 330; *Ex parte Harding*, 120 U. S., 782, 784; *In re Wood*, 140 U. S., 278, 287; *In re Jugiro*, 140 U. S., 291, 297; *In re Wilson*, 140 U. S., 575; *McElvain* v. *Brush*, 142 U. S., 160; *U. S.* v. *Pridgeon*, 153 U. S., 48, 62.)

This appeal has no merit. It is apparent it is frivolous and taken for delay merely. Perhaps I have dignified it by too much notice, but only for the purpose of exposing its utter lack of justification or excuse. It is to be hoped the inexperience of counsel for the appellant at this bar may save them from the reproof which the court deemed it proper to administer to counsel in the

case of *The Douro* (3 Wallace, 564, 566). The time of this and other courts is too much taken up with groundless appeals in frivolous habeas corpus cases, prosecuted not to secure justice, but to delay its execution. The appeal should be dismissed.

JOHN K. RICHARDS,
Solicitor-General.

In the Supreme Court of the United States

OCTOBER TERM, 1898.

JOHN ANDERSEN, APPELLANT,

Versus

MORGAN TREAT, United States Marshal for the Eastern District of Virginia, APPELLEE.

No. 415.

APPEAL FROM A DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, DENYING THE PETITION FOR A WRIT OF HABEAS CORPUS.

STATEMENT OF THE CASE.

The statement of this case is its best argument.

On Sunday, the 7th day of November, 1897, the crew of the American schooner "Olive Pecker," consisting of the petitioner and five others, were brought into Hampton Roads by the U. S. Ship "Lancaster," from Bahia, Brazil.

When it left Brazil the ship was destined for Boston, whither all the papers in the case had been sent to the United States Attorney for the District of Massachusetts by the Department of Justice.

Owing, however, to some derangement in the machinery of the Lancaster, she put into Hampton Roads on the evening of November 6th, 1897.

As jurisdiction obtained in that District into which the accused was first brought, the District Attorney for the Eastern District of Virginia was advised by a telegram from the Department of Justice, late in the evening of the 6th, that the "Olive Pecker mutineers from aboard Lancaster" would be delivered to the Marshal of the District on the next day, and directing that proper guards be ready to receive them and due arrangements made for their detention. The next day, the 7th, being Sunday, the men were delivered to the Marshal and placed in the city jail of Norfolk, and were on the next morning taken by the Marshal to his office adjoining the U. S. court room. There they gave the District Attorney their names and made voluntary statements of what occurred on the "Olive Pecker" on August 6th, 1897.

The petitioner on that occasion having stated that he had no counsel, and no money with which to employ any one, and that he desired the Court to assign him an attorney, was taken by the Marshal before Judge Hughes and requested him to assign him Mr. George McIntosh as his counsel. This was done, and Mr. McIntosh took immediate charge of his case. He waived an examination before the U. S. Commissioner, and was, on the 17th day of November, 1897, duly indicted for the murder of the captain and also of the mate of said vessel "Olive Pecker."

On the 15th day of December, 1897, the petitioner, by his counsel, George McIntosh, Esq., moved the Court to quash the indictment for the murder of the mate on the ground that it appeared from the records of the court that the grand jury which found the indictment had not been properly sworn. This motion was granted, and that indictment quashed. Thereupon another grand jury was impaneled and found a new indictment for the murder of the mate, the same being designated in the record No. 241.

On the 18th day of December, 1897, "the prisoner in person and by his counsel, George McIntosh, Esq., admitted service of copies of the indictment against" him "for the murder of Wm. Wallace Saunders, and numbered 241, and also of the list of jurors and witnesses for the United States, * * * * and announced his readiness to proceed with his trial on the said indictment numbered 241."

A demurrer to said indictment was thereupon interposed, and being overruled, John Andersen was duly arraigned and pleaded "not guilty." He and the other members of the crew having made voluntary statements to the American Consul at Bahia, these statements were, upon the call of Andersen's counsel, Mr. McIntosh, produced for his use at the trial. (See Record in *Anderson v. U. S., p. 13.*)

After various objections to the petit jury, the evidence was heard, and on the 23d day of December, 1897, the jury rendered a verdict of guilty, as charged in the indictment, without any qualification as to punishment.

Thereupon, by his counsel, Mr. McIntosh, he moved for a new trial and for an arrest of judgment, which motions being overruled, he was formally led to the bar of the court, "and it being asked of him if anything for himself he had or knew to say why the Court should not proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay of judgment," he was duly sentenced to be hung on the 18th day of March, 1898.

Thereupon his said counsel prepared for him an elaborate bill of exceptions and a petition for a writ of error, accompanied by a lengthy assignment of errors. This petition being granted, Andersen made an affidavit of poverty, and an order was entered that a transcript of the record should be made at the expense of the Government.

Thus the case found its way to this Court, and was placed

on its docket as No. 583, October term, 1897. It is reported in *170th U. S., 481*. After full argument by Mr. McIntosh, counsel for Andersen, this Court, on the 9th day of May, 1898, affirmed the sentence of the lower court. Whereupon his vigilant and untiring counsel submitted a motion for a rehearing, which being denied, this Court, on the 6th day of June, 1898, issued its mandate to the Circuit Court, directing that it carry out the said sentence.

Pursuant to said mandate, the Circuit Court did, on the 14th day of July, 1898, fix Friday, August 26th, 1898, as the time for the execution.

On the 26th day of August, 1898, and within a few hours of the time fixed for the execution of the petitioner, he filed a petition in the District Court of the United States for the Eastern District of Virginia, praying for a writ of habeas corpus.

That writ sets out the cause of the detention of the petitioner in the following language:

"Your petitioner represents that he was indicted, charged with murder on the high seas, in the Circuit Court in and for the Eastern District of Virginia, at the November term thereof, in the year 1897; that on the trial subsequent, beginning on the 18th of December, in the year 1897, and some time subsequent thereto, he was found guilty of the said charge of murder. That subsequent to said conviction he has been sentenced to be executed on the 26th day of August, 1898, between the hours of 2 P. M. and 6 P. M. of that day, and that he is now held in custody to be executed as aforesaid."

It will thus be seen that the petitioner cites as the cause of his detention the judgment and sentence of the Circuit Court, entered in accordance with the mandate of this Court. In a word, he refers to the judgment of this Court as the cause of his imprisonment.

The only ground of error relied on in the petitioner's appeal and assignment of errors is, "that the Court exceeded its power and jurisdiction in denying your petitioner the right of selecting his own counsel, as guaranteed by law." See page 6 of the record.

There is no pretension that the petitioner did not have the assistance of counsel; it is simply contended that he was denied *the assistance of counsel of his own choice.* This contention is refuted:

First—By the records of the Circuit Court of the United States and also of this Court.

Second—It has no foundation in fact.

(1) THE CHARGE IS REFUTED BY THE RECORD.

Reference to the order of the United States District Court denying the application for a writ of habeas corpus sets out an order of the United States Circuit Court entered on the 14th day of December, 1897, in the case of the *United States vs. Andersen*, wherein it is expressly stated that counsel of Andersen's own selection was assigned him by that Court. This order also appears in the records of this honorable Court. See page 1, transcript of the record in the case, No. 583, October term, 1897. The order referred to shows that the Circuit Court did, on the 8th day of November, *upon the request of the accused, John Andersen*, assign George McIntosh, Esq., as his counsel. The record of this court further shows that the said counsel, so assigned the petitioner at his request, did actually represent him in the trial court, from arraignment to sentence, and did also bring the case by appeal to this honorable court, where he argued it both on the merits and on a motion for a rehearing.

The charge, therefore, of the petitioner that he was denied

assistance of counsel of his own selection is absolutely refuted by the record of the said courts.

(2) THE CHARGE IS WITHOUT FOUNDATION IN FACT.

The petition states that on the 7th day of November, 1897, "*he employed as counsel to represent him one P. J. Morris, an attorney-at-law residing in the city of Norfolk, Virginia.*"

The order of the District Court denying the writ of habeas corpus contains a letter, made a part of the record in the case by consent, from this same P. J. Morris, wherein, commenting on a newspaper publication alleging that he had been refused admission "to see the prisoners in the 'Olive Pecker' case," he stated, among other things, that on the day succeeding the 7th, namely, the 8th of November, 1897, he called upon the District Attorney and told him not that he had been employed, but that *he expected to be employed by them.* The letter further shows that the said P. J. Morris also on that occasion stated that he was informed by the District Attorney that *when the men employed him they would be at his disposal.*

It will thus be clearly seen that the same P. J. Morris, whom the petitioner alleges he had employed on the 7th of November, had not actually been so employed on the 8th, the day subsequent thereto.

The petition alleges that the petitioner was deprived of the opportunity of being represented by the said P. J. Morris at his preliminary examination before the United States Commissioner. This statement is also falsified by the facts and by the record. The letter of P. J. Morris, just referred to, and written on the 9th of November, 1897, expressly sets out that

he was informed by the District Attorney, on the morning of the 8th of November, that he had not at that time himself had an interview with the prisoners; that he did not then know which would be indicted, and which might be needed only as witnesses, in the propriety of which position of the District Attorney the said Morris acquiesced. He further, in that letter, distinctly states that he understood that the interview of the District Attorney with the prisoners on that occasion *was voluntary* on the part of the prisoners. He further states in this letter that the District Attorney had done nothing to justify criticism on his part, but on the contrary was entitled to his thanks for "courtesies of a very considerate character."

In the brief filed by P. J. Morris and Hugh G. Miller on October 12th, at p. 11, speaking of this letter, it is stated that:

"We submit that the letter has no connection with this case, and never did; that the petitioner's name is in nowise connected with its execution, and that he is not referred to even in its contents. It refers to other defendants, and, as a matter of fact, it was not intended to refer to the petitioner. Its introduction was consented to by counsel for the petitioner at the request of the District Attorney, upon representations made by him which developed, after the record was made up, were incorrect, evidently by unintentional error on his part. Its proper connection with the record can never be known unless a hearing can be had upon the writ."

This statement is entirely gratuitous and is not justified by anything which occurred at the hearing, or which has transpired since, or which is contained in the letter itself, and this letter does refer to Andersen as well as to all the other members of the crew of the "Olive Pecker."

The same order of the District Court in this case contains another writing, dated the *7th of November, 1897*,

signed by five of the crew of the "Olive Pecker" *other than the petitioner, John Andersen*, addressed to the said P. J. Morris, requesting an interview with him to arrange for their defence; and still another dated *November 8th, 1897*, signed by the same five members of the crew, employing the said Morris to represent them. As a matter of fact, only three of these men were ever indicted, and the indictments in these three cases voluntarily dismissed by the Government.

It appears from the transcript of the record of Andersen's case in this court that so far from the accused, John Andersen, having been denied the assistance of counsel at his examination before the United States Commissioner, he expressly waived that examination. See Bill of Exceptions, p. 9 of that record, wherein, among other things, it is stated: "*The accused, having waived examination before the United States Commissioner, was in due course indicted in the Circuit Court of the United States*," etc., etc.

Thus we find this other charge of the petitioner, in his application for the writ, disproved by both the record and the facts.

THE LAW OF THE CASE.

(1) *The cause of detention of the petitioner being a sentence of death pronounced pursuant to a mandate of this court, it will in passing on the petition for the writ of habeas corpus consult its own records. In re Jugiro, 140 U. S., 291, 295. In re Boardman, 169 U. S., 39, 44.*

Indeed it would seem that the petitioner is forbidden to show anything which contradicts the record. *In re Cuddy, 151 U. S., 281.*

In Bigelow's case, 113 U. S., 328, the record of the trial court was filed with the petition for the writ, and so was considered by this court. In the present case the record of

the trial court is a part of this court's own records, and will of course be considered.

(2) *The writ of habeas corpus cannot be resorted to for the purpose of correcting errors of the trial court.*

This doctrine was announced by Chief Justice Marshall in *Ex parte Wilkins, 3 Pet., 193,* and has been adhered to in an unbroken line of decisions. Many of these are cited by the Solicitor General in his very full brief on motion to dismiss this appeal. The following may be added:

"A writ of habeas corpus cannot be made use of as a writ of error." *Crossley v. California, 168 U. S., 640.*

(3) *The writ of habeas corpus will not be issued if it appear that the petitioner is detained under the judgment of a court having jurisdiction of the person and the offence.*

Marshall, C. J., thus defines the principle:

"An imprisonment under a judgment cannot be unlawful unless that judgment be a nullity, and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." *3 Pet., 193, 203.*

In later times Waite, C. J., expressed the same doctrine in the following language:

"The reviewing power of this court in a criminal case is, on a writ of habeas corpus, confined to the determination of the question whether the court which sentenced the prisoner had jurisdiction to try him for the offence whereof he was indicted and to sentence him to imprisonment." *Ex parte Carll, 106 U. S., 521.*

Probably as explicit an utterance on the subject as can be found is the following:

"Under a writ of habeas corpus the inquiry is not addressed to errors, but to the question whether the proceedings

and judgment are nullities; and unless it appears that the judgment or sentence under which the prisoner is confined is void, he is not entitled to his discharge." *U. S. v. Pridgeon, 153 U. S., 49.*

The law under the two headings above is also well stated by Judge Jackson, afterwards a Justice of this court, in a learned opinion pronounced *In re King, 51 Federal Reporter, 434*, where all the authorities previous to that time are cited with great care.

Finally, in the late case more generally known as the Durrant case, but reported under the title of "In re Boardman," the present Chief Justice says:

"The rule was laid down in Spies v. Illinois, 123 U. S., 131, that when application is made to this court for the allowance of a writ of error to the highest court of a State, the writ will not be allowed if it appear from the face of the record that the decision of the Federal question which is complained of was so clearly right as not to require argument. And the same rule governs an application to us for the writ of habeas corpus, which must be denied, if it be apparent that the only result, if the writ were issued, would be the remanding of the petitioner to custody, for the object of the writ is to ascertain whether the prisoner applying for it can legally be detained, and it is the duty of the court, justice or judge, granting the writ, on hearing, 'to dispose of the party as law and justice may require.' Rev. Stat., Sec. 761; Iasigi v. Van De Carr, 166 U. S., 391; Ekiu v. United States, 142 U. S., 651." *In re Boardman, 169 U. S., 39, 43.*

The entirely unique question presented to this court is whether its own judgment affirming the sentence of the Circuit Court and directing that court to carry it into effect, is a nullity. In this respect the case is without precedent. In none of the reported cases decided by this court was it called upon to say whether a person was illegally detained who was

held under the sentence of the lower court, which had been affirmed by this court.

The peculiarity of the case is still further emphasized by the fact that the only ground relied on by the petitioner is that he did not have the assistance of counsel as guaranteed by Article VI of the Constitution of the United States, when the record of the case shows not only that he was represented by able counsel, but actually by counsel assigned him at his own request.

If it were true, as alleged by the petitioner, that he employed P. J. Morris to conduct his defence, and that he was forbidden by the Court and District Attorney to have that attorney represent him, then this denial of his rights was known to him and his alleged counsel before his indictment and trial. Why should both attorney and client remain silent through the Circuit Court during the trial and through this court on appeal? It cannot be that abundant opportunity was not afforded him as well as P. J. Morris to make it known, if true. Greater opportunities were offered for such a defence than were offered on the 26th day of August last, when, within a few hours of the time appointed, pursuant to the mandate of this court, for the execution of Andersen, the petition for a writ of habeas corpus was filed before the District Court by the same P. J. Morris who, it is alleged, had been employed as his attorney ever since the 7th day of November, 1897.

In this connection it may not be uninteresting to refer for a moment to the view which this court has taken of the privileges given by the said Articles of the Constitution of the United States. In the case of *Ex parte Bigelow, 132 U. S., 328–330:* On motion for leave to file a petition for a writ of habeas corpus Mr. Justice Miller said as follows:

"This Article V of the Amendments, and Articles VI

and VII, contain other provisions concerning trials in the courts of the United States designed as safeguards to the rights of parties. Do all of these go to the jurisdiction of the court? And are all judgments void where they have been disregarded in the progress of the trial? Is a judgment of conviction void when a deposition has been read against a person on trial for crime because he was not confronted with the witness, or because the indictment did not inform him with sufficient clearness of the nature and cause of the accusation?

"It may be confessed that it is not always easy to determine what matters go to the jurisdiction of a court so as to make its action when erroneous a nullity. But the general rule is that when the court has jurisdiction by law of the offence charged, and of the party who is so charged, its judgments are not nullities."

Intelligent consideration of these articles lead to the conclusion that the nature of almost every provision thereof requires that an objection based upon an alleged denial of the right given must be urged at the trial, and if this is not done the right will be considered as waived, or if urged and denied, the alleged error is for the consideration of an appellate court only.

Article V provides that trials for capital or infamous offences must be on indictment of the grand jury. We know that all exceptions to the organization of the grand jury must be raised during the trial.

Gale's case, 109 U. S., 64.
Harding's case, 120 U. S., 782-784.

That article further provides that a man shall not be put twice in jeopardy of his life. Yet this court has decided that that must be pleaded during the trial.

Bigelow's case, 113 U. S., 328-330.

Article VI provides that the accused shall enjoy the right

to a speedy and impartial trial. It will scarcely be contended, that this privilege could be asserted, after sentence, by way of a writ of habeas corpus, and the judgment declared a nullity.

It further provides that the case shall be tried by "an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law." The statement of this provision necessarily implies that it shall be availed of during the trial, and if not, the validity of the judgment will not be thereby affected.

This article further provides that the accused shall be informed of the nature and cause of the accusation against him. Any defect in the form and nature of an accusation must be asserted during the trial. This was expressly held in *Bigelow's case, 113 U. S., 328-330.*

Again, the same article provides that the accused shall be confronted with the witnesses against him. Certainly, if no objection is made to hearsay testimony or a deposition at the time of its introduction, this right will be considered waived.

Bigelow's case, supra.
Pearson's case, 79 N. Y.

The article also gives the accused compulsory process for obtaining his witnesses. Yet this court has decided that a failure to assert this privilege at the trial does not vitiate the judgment of the Court.

Harding's case, 120 U. S., 784.

Finally, that clause of the Constitution grants the accused the right to have the assistance of counsel. Like the other provisions of the above articles, if not asserted at the trial it will be considered as waived. In *Gugiro's case, 140 U. S.,*

the contention was that the accused was not assigned proper counsel, in that he was not a person qualified to practice law. The objection was held not to disturb the validity of the judgment.

While it is conceded that the right to be represented by counsel is a high one, mounting almost into the region of the sanctities, it must at the same time be conceded that the dignity of the court, the orderly administration of justice, the integrity of the law must also be considered and preserved. To hold that an accused may come into court alleging his poverty and have counsel assigned for his defence, who thereupon conducts such defence from arraignment to conviction, and, on conviction, takes the case by appeal to the court of last resort, where his conviction is affirmed and sentence directed to be executed; then, further, to permit such an accused again to enter that final tribunal with the claim that its judgment is a nullity because the counsel who represented him therein was not of his own choice, would, to say the least, be a most remarkable reflection upon the judicial system of any country.

We respectfully submit that the record in this case discloses that the accused has had an eminently fair trial, aided by vigilant and able counsel—counsel which the records of this Court show was assigned at his own request.

The refusal of the District Court to grant his petition should be affirmed and the appeal dismissed.

WM. H. WHITE,
U. S. Attorney for the Eastern District of Virginia.